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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Stellar Industries, Inc.

File: B-222646

Date: August 21, 1986

DIGEST

Bid received under total small business set-aside, wherein the bidder represented that it was a small business and listed its own (small business operated) plant as the place of performance but represented that not all supplies to be furnished would be manufactured by a small business, is ambiguous. Its rejection as nonresponsive was therefore proper, notwithstanding the inclusion of a clause prohibiting any change in the designated place of performance absent agency approval.

DECISION

Stellar Industries, Inc. (Stellar), a small business concern, protests the rejection of its bid by the Defense Logistics Agency (DLA) as nonresponsive under invitation for bids (IFB) No. DLA 13H-86-B-8535. The DLA rejected Stellar's bid because it indicated that not all supplies to be furnished under the contract would be manufactured by a small business.

We deny the protest.

The IFB contained the standard Small Business Concern Representation set forth in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.219-1 (1985). In this representation, Stellar checked one box to indicate that it was a small business concern, but checked another box that indicated "not all supplies to be furnished will be manufactured or produced by a small business concern. . . ." In the "Place of Performance" clause in the bid, Stellar designated the facility it intended to use in producing the supplies to be furnished under the contract, identified itself as the owner or operator of the facility, and represented its business size status as small. DLA's contracting officer rejected Stellar's bid as nonresponsive because he determined that it was not clear from the face of the bid that Stellar was agreeing to furnish

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only products manufactured by a small business. The contracting officer reasoned that the two contradictory statements in Stellar's bid created an ambiguity as to what the bidder was promising, requiring rejection of the bid as nonresponsive.

Stellar argues that its failure to check the correct box on the bid form represents a mere clerical error and that the error should be waived because it was otherwise clear from its bid that Stellar would be legally bound to furnish supplies manufactured or supplied by a small business. Stellar points out, in this connection, that the "Place of Performance" clause required bidders to identify the production facility that would be used and prohibited any subsequent change in the place of performance without the advance approval of the contracting officer. Stellar insists that it consequently was legally bound by its bid to furnish supplies produced by a small business.

While we have held that the failure to complete (or completing erroneously) the small business size status portion of the representation is a waivable minor informality, Extinguisher Service, Inc., B-214354, June 14, 1984, 84-1 CPD ¶ 629, we have distinguished this from the second portion of the representation, which involves a matter of responsiveness. See Polan Industries, B-218720.2, May 30, 1985, 85-1 CPD ¶ 617.

A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. See FAR, 48 C.F.R. § 14.301 (1985). The certification concerning the bidder's obligation to furnish small business products is a matter of bid responsiveness because it involves a performance commitment, i.e., to deliver products manufactured by a small business. Thus, the bidder's intention to do so must be established at the time of bid opening, and must be unequivocal. Otherwise the small business contractor could defeat the purpose of the set-aside program by delivering products from either small or large business firms as its own interest might dictate. Ginter Welding, Inc., B-218894, May 29, 1985, 85-1 CPD ¶ 612. Further, where a bid is reasonably susceptible of two interpretations, one responsive and the other nonresponsive, the bid must be rejected since such ambiguity may not be explained after bid opening. Harco Inc., B-189045, Aug. 24, 1977, 77-2 CPD ¶ 144.

Here, Stellar's alleged error in representing that not all supplies would be manufactured by a small business concern cannot be cured by referring to the Place of Performance

clause because the bid is internally inconsistent and is, therefore, ambiguous. We therefore find that Stellar's bid as submitted does not represent an unequivocal offer to provide a product manufactured by a small business as required by the solicitation.

Stellar emphasizes that "Clause K 89," included in the Place of Performance portion of the bid, required bidders to stipulate the production facility to be used under the contract and prohibited any subsequent change unless approved by the contracting officer. Stellar contends that it would be bound by its commitment under this clause to furnish products manufactured at its own (small business) plant as identified in its bid. Stellar argues that this clause has only recently been adopted by the agency, and that prior Comptroller General decisions are not applicable here because they did not involve this clause.

We disagree. Although this particular clause may be new, its effect is not. In Prestex, Inc., 59 Comp. Gen. 140 (1979), 79-2 CPD ¶ 411, we were presented with a similar situation. The protester's bid under a total small business set-aside indicated that the bidder, as a regular dealer, would not supply materials manufactured by small business concerns, although it listed small businesses in the Place of Performance clause. The agency rejected the bid as nonresponsive because it did not include a binding promise to meet the set-aside requirement. The protester argued that its faulty representation was caused by a typing error, and that the Place of Performance should govern. This clause also provided that the bidder could not change its manufacturing suppliers from those listed on its bid without the permission of the contracting officer. We determined there, as we do here, that the completion of the Place of Performance clause simply did not obligate the bidder to comply with the small business requirement in view of the contrary representation in the clause specifically intended for that purpose. Rather, the completion of the Place of Performance clause at best created an ambiguity which required rejection of the bid as nonresponsive. Prestex, Inc., *supra.*, at 3.

It is this essential ambiguity which also distinguishes this case from our decision in ASC Industries, B-216293, Dec. 21, 1984, 84-2 CPD ¶ 684, which also involved a clause precluding any change in the place of performance designated in the bid. There, the bidder had failed to certify that the goods to be supplied would be manufactured or produced by a small business concern, although it listed a small business as the

proposed manufacturer in the Place of Performance clause. The inference that the bidder intended to supply small business-manufactured goods could be drawn from the bid, read as a whole, because there was no contradictory representation in the bid. Here, however, Stellar's representation that not all goods would be manufactured by a small business concern precludes drawing such inference and renders the bid ambiguous.

The protest is denied.

for *Seymour Efros*
Harry R. Van Cleve
General Counsel